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Division II
State of Washington

No. 50118-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shelly Arndt,

Appellant.

Kitsap County Superior Court Cause No. 14-1-00428-0

The Honorable Judge Leila Mills

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

ARGUMENT

I. THE TRIAL COURT'S FINDING OF MISCONDUCT IS A VERITY ON APPEAL AND REQUIRES REVERSAL.

Unchallenged findings are verities on appeal. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580, 583 (2016). The State has not assigned error to the trial court's finding that Juror Watson committed misconduct. Brief of Respondent, p. 1. The findings are thus verities. *Id.; State v. Unga*, 165 Wn.2d 95, 103, 196 P.3d 645, 650 (2008).[1]

Because Ms. Arndt established juror misconduct, she has made the "strong, affirmative showing of misconduct [that] is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Contrary to Respondent's argument, she has no additional burden. *See* Brief of Respondent, pp. 31-33.

Upon a showing of misconduct, prejudice is presumed. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740 (2006) *see also, e.g., State v. Amundsen*, 37 Wn.2d 356, 362, 223 P.2d 1067 (1950). The burden then shifts to the State to show, beyond a reasonable doubt, that the misconduct

[1] In addition, findings of fact "are verities on appeal if supported by substantial evidence." *State v. Andy*, 182 Wn.2d 294, 301, 340 P.3d 840, 843 (2014). The court's misconduct finding in this case is supported by substantial evidence. It is a verity on this basis as well. *Id.*

could not have contributed to the verdict. *State v. Johnson*, 137 Wn. App. 862, 870, 155 P.3d 183 (2007).

Any "doubt that the misconduct affected the verdict must be resolved against the verdict." *Id.*, at 869; *Boling*, 131 Wn. App. at 333. This necessarily includes any "doubt" about the exact definitions reviewed by Juror Watson before she voted to convict.

Having already established misconduct, Ms. Arndt is not obligated to prove that Juror Watson viewed a definition that might have caused prejudice. It is enough that Juror Watson researched definitions of "premeditation," rather than some term unrelated to the trial.

Given the court's finding of misconduct, the State bore the burden of showing harmlessness beyond a reasonable doubt. *Johnson*, 137 Wn. App. at 870. It could not do so without showing what websites Juror Watson consulted and what definitions she reviewed.

Respondent erroneously asserts that Ms. Arndt was obligated to prove more than a possibility of prejudice and that she failed to do so. Brief of Respondent, p. 31 (citing *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)). This is incorrect. *Lemieux* did not involve juror misconduct, and thus no presumption of prejudice arose in that case. *Lemieux*, 75 Wn.2d at 90-91. Here, by contrast, Juror Watson's misconduct gives rise to a presumption of prejudice, and so Ms. Arndt is

not obligated to show a possibility of prejudice. *Boling*, 131 Wn. App. 333.

Furthermore, even if Ms. Arndt was required to show more than a possibility of prejudice, she has done so here. Juror Watson researched the word "premeditation" – an element of the offense and the subject of a court instruction. She did not research a word unrelated to the case.

The trial court's unchallenged finding of misconduct gave rise to a presumption of prejudice that the State failed to rebut. This requires reversal of Ms. Arndt's conviction for premeditated murder. *Boling*, 131 Wn. App. at 333. The charge must be remanded for dismissal or for a new trial. *Id.*

II. THE COURT OF APPEALS MUST REVERSE UNDER ANY STANDARD OF REVIEW.

Alleged constitutional violations are reviewed *de novo*. *See, e.g., State v. Fisher*, 185 Wn.2d 836, 841, 374 P.3d 1185 (2016). In this case, Juror Watson's misconduct violated Ms. Arndt's constitutional right to a fair trial by an impartial jury. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§ 21 and 22.

Review is therefore *de novo. Fisher*, 185 Wn.2d at 841. The *de novo* standard for alleged constitutional errors should apply even when premised on a discretionary trial court decision. *Id.;* Appellant's Opening

Brief, pp. 6-10. Otherwise, constitutional rights will be subordinate to trial court discretion.

The Court of Appeals should review the error *de novo* for another reason as well: the trial court applied the wrong legal standard in denying Ms. Arndt's motion. Legal issues are reviewed *de novo. State v. Drum*, 168 Wn.2d 23, 31, 225 P.3d 237 (2010).[2]

The trial court erroneously decided it could not order a new trial based on "what is 'not known.'" CP 138 n. 49. This is incorrect: "what is 'not known'" in this case is whether the misconduct was harmless beyond a reasonable doubt. The State could not produce facts proving harmlessness; this failure should have been held against the State.

Doubts about the effect of misconduct "must be resolved against the verdict." *Johnson*, 137 Wn. App. at 869-870; *Boling*, 131 Wn. App. at

[2] *Cf.* Brief of Respondent, p. 27 ("'[S]o long as the trial court has applied the proper legal standard of proof to the evidence, the trial court's decision deserves deference'") (quoting *State v. Elmore*, 155 Wn.2d 758, 768, 123 P.3d 72 (2005)). *Elmore's* discussion of deference does not control here. The question facing the *Elmore* court was "the proper evidentiary standard that trial courts must apply when considering whether a juror is unfit to continue deliberating." *Elmore*, 155 Wn.2d at 768. The court concluded that a "reasonable possibility" standard combined with deference on review struck an appropriate balance. *Id.,* at 777. The considerations at play in *Elmore* do not apply here.

333. Because the State did not produce the websites and definitions Juror Watson reviewed, it could not prove that her misconduct was harmless.[3]

The trial court should have resolved all doubts against the verdict and ordered a new trial. *Johnson*, 137 Wn. App. at 869-870; *Boling*, 131 Wn. App. at 333. Its failure to do so is a legal error. The Court of Appeals should review this legal error *de novo. Drum,* 168 Wn.2d at 31.

Finally, reversal is required even if review is for an abuse of discretion. A trial court abuses its discretion "when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons." *State v. Hand,* 199 Wn. App. 887, 898, 401 P.3d 367 (2017).

The trial court's refusal to grant a new trial was manifestly unreasonable, based on untenable grounds, and made for untenable reasons. *Id.* Juror Watson repeatedly acknowledged that she consulted a dictionary, looked up the definition of premeditation, and then voted to convict Ms. Arndt of premeditated murder. RP (2/6/17) 19-20, 31-33; CP 16-20, 37, 39, 44.

The court found that Juror Watson committed misconduct, and acknowledged that there were "unknowns" about the websites Juror

[3] This is especially true in situations like the one here: "[w]here misconduct is admitted, a juror cannot be heard to deny its prejudicial effect." *State v. Hawkins*, 72 Wn.2d 565, 571, 434 P.2d 584 (1967).

Watson consulted and the definitions she reviewed. CP 136, 138. Having found juror misconduct, the judge should have presumed prejudice and placed the burden on the State to prove harmlessness beyond a reasonable doubt. *Boling*, 131 Wn. App. 333. She was required to hold any remaining "unknowns" against the State. CP 136, 138. These "unknowns" regarding the websites and definitions mean the prosecution failed to meet its burden of proving harmlessness beyond a reasonable doubt. *Id.*

Reversal is required under any standard of review. Ms. Arndt's conviction for premeditated murder must be vacated. *Id.*

III. PREJUDICE IS PRESUMED, AND RESPONDENT CANNOT PROVE THAT THE MISCONDUCT WAS HARMLESS BEYOND A REASONABLE DOUBT.

Because prejudice is presumed and all doubts are resolved against the verdict, the State cannot show that the misconduct had no impact. *Boling*, 131 Wn. App. at 333. It is irrelevant that definitions Juror Watson found included the word "short" or the phrase "however short." CP 138; *see* Brief of Respondent, pp. 32-33.

Instead, doubts arise from the possibility that some definitions included other words and phrases. The State did not prove that all definitions available on the internet were "indistinguishable to the jury instruction and… consistent with the law." CP 138. Nor did the State

produce Juror Watson's browsing history to show the websites she visited included only such definitions.

The undisputed finding of misconduct, the presumption of prejudice, and the State's failure to produce the websites and definitions Juror Watson examined are fatal to Respondent's argument. The conviction must be reversed. *Id.*

In its discussion of harmless error, Respondent implies that premeditation could not have been an issue at the trial.[4] Brief of Respondent, p. 38.

This is incorrect. Ms. Arndt denied the charges, and did not concede any of the elements.

Jurors could have believed that Ms. Arndt planned to set a fire but only formed the intent to kill Veeder after she had already started the fire. Thus, contrary to Respondent's assertion, the fire could have been incendiary and the killing intentional but unpremeditated. *Cf.* Brief of Respondent, p. 38.

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[4] Respondent also erroneously states as fact that Ms. Arndt did not raise any "issues regarding premeditation" in her direct appeal from the conviction. Brief of Respondent, p. 2. This "fact" is unsupported by the record on appeal and should be stricken from Respondent's brief. It is also incorrect. Ms. Arndt's arguments regarding the improper exclusion of expert testimony relate directly to evidence the State relied on to argue premeditation. RP 4334, 4403-4404; *see also* Court of Appeals No. 48525-7-II, Appellant's Opening Brief, available at http://www.courts.wa.gov/content/Briefs/A02/485257%20Appellant's%20Brief.pdf (accessed September 27, 2017).

Furthermore, the prosecution's argument to the jury about premeditation rested (at least in part) on disputed expert testimony. The State relied on Fire Marshal Lynam's "beanbag theory." RP 4333-4334, 4403-4404. The "beanbag theory" suggested that Ms. Arndt began planning the day before the fire started. RP 1008, 1086; *see* Brief of Respondent, p. 7 ("Arndt scoped out the basement area where the fire began the day before the fire.")

But the beanbag theory was contested. The defense expert undermined the fire marshal's ignition theory, and Lynam backed away from it in his rebuttal testimony. RP 4248. Jurors who discounted the beanbag theory may have decided that Ms. Arndt spontaneously decided to kill Veeder by starting a fire, using some other (unplanned) ignition sequence. This, too, would have established intentional but not premeditated murder.

The trial judge found misconduct. Respondent does not assign error to this finding. Because prejudice is presumed, the burden is on Respondent to prove harmlessness beyond a reasonable doubt. The State cannot do so without producing the websites and definitions Juror Watson reviewed. Accordingly, the conviction for premeditated murder must be reversed. *Boling*, 131 Wn. App. at 333.

CONCLUSION

Juror misconduct requires reversal of the conviction for premeditated murder.

Respectfully submitted on October 2, 2017,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 2, 2017.

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